No. 96-1829

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

STATE OF MONTANA; MARY BRYSON;
BIG HORN COUNTY; and MARTHA FLETCHER,
Petitioners,

v.

CROW TRIBE OF INDIANS; and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of *Amicus Curiae* Multistate Tax Commission in Support of State of Montana

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BRIEF OF *AMICUS CURIAE* MULTISTATE TAX COMMISSION IN SUPPORT OF STATE OF MONTANA[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission ("Commission") joins *Amici* States of California *et al.* in urging that the Court review this matter. The Commission files its own brief to indicate its support of review being granted, because it is unable to join the brief of *Amici* State of California *et al.* (States represented by their Attorneys General are subject to different Court rules, Sup. Ct. Rules 37.4 and 37.6 (May 1, 1997), and at least one State participating in the Brief of *Amici* State of California *et al.* has a policy of not joining in any brief with *amici* other than States represented by their Attorneys General.)

The Commission views *Crow Tribe of Indians* v. *Montana*, 92 F.3d 826, *amended*, 98 F.3d 1194 (1996), with alarm. The decision departs from the established rule of *United States* v. *California*, 507 U.S. 746 (1993), by recognizing in effect a new cause of action in non-taxpayers. The decision allows non-taxpayers to pursue against a State a money damage claim for taxes paid by a third-party taxpayer who has released any claim to the taxes

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[1]No counsel for any party authored this brief in whole or in part, although the brief was submitted to counsel for Petitioner State of Montana who made comments that were considered in preparation of this brief. Only *Amicus* Multistate Tax Commission and its members States made any monetary contribution to the preparation or submission of this brief. Finally, this brief is filed pursuant to the consent of the parties.

paid, if the non-taxpayer has been economically injured by a State's constitutionally invalid tax.

The decision is a departure from previous understandings about remedies for unconstitutional taxes. *McKesson Corp.* v. *Florida Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), stated that unconstitutional taxation requires meaningful backward looking relief for the *affected taxpayer. Id.* at 31. The constitutional necessity for this kind of relief exists even in the presence of some sense that others may have borne some of the economic burden of the illegal taxes. *Id.* at 46-49. The Ninth Circuit's decision is sure to spawn lurking claims that will unjustifiably interfere with state taxation, a reserved right of sovereignty of the States to operate effectively in their own sphere of influence.

Interference with state tax sovereignty concerns the Commission, because it was founded out of the increased interest of Congress to regulate state taxation. The Commission itself is the administrative agency formed by the MULTISTATE TAX COMPACT, RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 751 (1994). Twenty-one States have adopted the MULTISTATE TAX COMPACT through State legislation. Sixteen additional States have ratified the goals of the Commission by joining as associate member States.[2]

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[2]The current full members are the States of Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine (effective 09/19/97), Minnesota, Missouri, Michigan, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, and Washington. The associate members

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax systems that followed the findings and recommendations of the Willis Committee. *See* Corrigan, *A Final Review*, 1989 MULTISTATE TAX COMM'N REV. 1, 1 and 23.[3] In recent times, growing from its historical concern over preserving a workable system of state taxes that is essential to the proper exercise of state sovereignty within our federal system, the Commission follows and participates in many federal level issues. The Commission's participation extends to federal legislative, executive, and judicial processes, when the issues presented have the potential to impact state tax sovereignty significantly.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED UNDER THE AUTHORITY OF *UNITED STATES* v. *CALIFORNIA* AND THE ACTION IN *ASSUMPSIT* FOR TAXES PAID BY A THIRD-PARTY NON-TAXPAYER THEREAFTER DISMISSED.

The Commission joins in the argument advanced by *Amici* State of California *et al.* in their brief filed in this matter.

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are the States of Arizona, Connecticut, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin.

[3]The Willis Committee, a congressional study of State taxation of interstate commerce sanctioned by TITLE II of PUB. L. NO. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate State taxation of interstate and foreign commerce.

II. THE PETITION SHOULD BE GRANTED TO PREVENT A NEW REMEDY FROM CAUSING MANY UNINTENDED AND UNJUSTIFIED CONSEQUENCES TO THE STATES' PROPER EXERCISE OF THEIR TAXING POWER.

Presumably a taxpayer has sufficient economic incentive in most circumstances to pursue a deprivation of a constitutional right by state taxation. Taxpayers under the decisions of this Court are even free to pursue their own economic interests to challenge state taxation, when the constitutional right in some sense may be said to rest in a sovereign and not the individual taxpayer. See *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 814-815 (1989) (private parties may challenge state taxes based upon the intergovernmental immunity of United States). The taxpayer is free to assert its full claim even in the face of evidence suggesting others may have borne some of the economic burden of the illegal taxes. *McKesson Corp.*, *supra* at 496 U.S. 46-49. And sovereigns United States and Indian Tribes are further protected in their own right by having clear authority to secure extraordinary relief (presupposing to some extent the inadequacy of a remedy at law and the serious risk of irreparable harm), when individual taxpayers may not have the capacity, level of interest, or incentive to preserve the sovereign's rights. See *Montana* v. *Crow Tribe of Indians*, 484 U.S. 997 (1988), *summarily aff'g*, 819 F.2d 895 (1987), (Tribe may secure declaratory and injunctive relief for taxes preempted by federal law and infringing on tribal sovereignty); *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (same); *Department of Employment* v. *United States*, 385 U.S. 355 (1966) (United States, and/or its instrumentality

with joinder of the United States, may secure injunctive and declaratory relief for unconstitutional taxes).

In the face of these safeguards, it is surprising to find a circuit court now suggesting that sovereigns economically injured by a state tax system are additionally free to pursue a *quasi*-contract remedy against a State for taxes paid by another when the taxpayer has released any claim to the taxes paid. The consequences of this approach are intimidating.

The United States apparently could sue the States in the *Davis*, *supra*, circumstances for an award in the amount of the discriminatory taxes paid by the federal employees even when the injured federal employees had been totally satisfied for their discriminatory tax burden. This additional *legal* remedy, Dan B. Dobbs, HANDBOOK ON THE LAW OF REMEDIES 236 (1973), appears unseemly in light of the apparent right the United States would have from the inception of the discriminatory tax to seek extraordinary declaratory and injunctive relief. After all, access to injunctive relief undoubtedly reflects some sense that the United States in matters of clashing sovereigns has no difficulty in meeting the two equitable requirements for this kind of relief—an inadequate remedy at law and serious risk of irreparable harm. *Pulliam* v. *Allen*, 466 U.S. 522, 537-38 (1984).

The electric utility customers of the coal operator in this case, the ones who contractually were to bear the burden of the tax, Pet. App. 30 (FOF 44)), could be pursuing the same claim that the Tribe is pur-

suing.[4] Similarly, the coal operator, assuming it had not settled with the State in this case, could pursue its own full right to receive the taxes it illegally paid without any reduction in its claim. This state of affairs will raise very difficult factual questions and increase the complexity of state tax refund litigation based upon deprivation of constitutional rights beyond its already its current lofty heights. *See McKesson*, *supra* at 496 U.S. 46-49.

If all these parties, including the Indian Tribe, have claims, then the court addressing a refund claim brought by only one will face a significant issue of determining how to proceed in the absence of the others. Issue preclusion can also become relevant. The court might face at some point a possible issue of apportionment among the competing injured parties with respect to any award. These issues which are substantial enough says nothing about considerations of State sovereign immunity at least with respect to claims that are not brought by the United States in its capacity as sovereign as opposed to derivative claims brought as a representative of the Indian Tribe.

States that do not provide monetary remedies to all injured parties for illegal taxes paid will face a new assault on the primacy of their state tax remedies. Clearly, these States will be challenged for not providing a "plain, speedy and efficient" remedy. TAX INJUNCTION ACT, 28 U.S.C. §1341 (1994).

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[4]In fact, while the public utilities in this case did seek to intervene, the District Court rejected this initiative and the denial was not further appealed. Clerk's Record 380.

These examples indicate that the Court should take a serious look at the additional *legal* remedy that has been provided to the Tribe and the United States in the latest round of this litigation. This case has significance far beyond the litigants and the solvency of Montana.

CONCLUSION

Unites States v. *California*, *supra*, clearly governs the proper disposition of this case. To allow the Ninth Circuit's decision in this case to stand without this Court's examination is to spawn a new genre of litigation whose actual consequences can only be identified through a tortuous period of avoidable litigation. The avoidance of litigation that would unnecessarily and adversely impact the proper functioning of state taxation, a core power of state sovereignty, is a compelling reason for the Court to review this matter.

RESPECTFULLY SUBMITTED,

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